No. 88-408

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MIDDLE SOUTH UTILITIES, INC., *et al.*,

Petitioners,

—v.—

RITA ISQUITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

JAMES W.B. BENKARD
DAVIS, POLK & WARDWELL
New York, New York
Counsel for Petitioners Morgan Stanley & Co., First Boston Corp. and Merrill Lynch Capital Markets

HENRY G. BISGAIER
CAHILL GORDON & REINDEL
New York, New York
Counsel for Petitioner Deloitte, Haskins & Sells

CHARLES F. SCHIRMEISTER
Counsel of Record
LOUIS H. WILLENKEN
PETER C. WILLIAMS
REID & PRIEST
40 West 57th Street
New York, New York 10019
(212) 603-2000

HERSCHEL L. ABBOTT, JR.
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
New Orleans, Louisiana

W.D. MERIWETHER, JR.
Of Counsel
MIDDLE SOUTH UTILITIES, INC.
Counsel for Middle South Utilities Petitioners

October 17, 1988

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases: PAGE

Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97 (5th Cir. 1974) 2

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2

Mayer v. Oil Field Systems Corp., 803 F.2d 749 (2d Cir. 1986) 2

Rules:

Federal Rules of Civil Procedure, Rule 56(b) 2

Federal Rules of Civil Procedure, Rule 56(f) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-408

MIDDLE SOUTH UTILITIES, INC., *et al.*,

Petitioners,

—v.—

RITA ISQUITH, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

The discussion of materiality issues that comprises the bulk of respondents' Brief in Opposition has no bearing on the issue of loss causation, which was fundamental to the District Court's grant of summary judgment and which the petition raises as a direct result of the Court of Appeals' decision. In reviewing the District Court's grant of summary judgment against respondents, the Court of Appeals unequivocally rejected, *sua sponte*, the increasingly employed "total picture" disclosure analysis adopted by the District Court and instead required, without citation of authority, that the District Court individually test each of the more than forty challenged MSU disclosures against respondents' various allegations. (39a-45a.) The Court of Appeals' decision thus flatly rejects the use of loss causation analysis to expose unmeritorious securities fraud claims. The Court of Appeals' entirely separate treatment of certain materiality issues (30a-38a) is not challenged by the petition and is entirely distinct from the Court of Appeals' subse-

quent rejection of the District Court's causation analysis.[1] The extensive argument in respondents' brief concerning materiality thus fails to address loss causation, which is the dispositive issue raised in this case (Opp. 2-10.)

Respondents' suggestion that the summary judgment policies underlying this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), should apply only following the completion of discovery is also without merit. (Opp. 2, 6-7, 10.) Federal Rule of Civil Procedure 56(b) provides that a defending party may move for summary judgment "at any time." In a securities fraud case such as this, where respondents claim that MSU inadequately disclosed five negative investment factors (Opp. 2 n.2), any lack of discovery is not relevant to a summary judgment motion by MSU which simply asserts that MSU's public disclosures clearly disclosed the five factors. *See, e.g.*, *Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 755 (2d Cir. 1986) (upholding summary judgment dismissing nondisclosure claims where "[t]he documents reveal that [the allegedly undisclosed] facts were disclosed"); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 101 (5th Cir. 1974) (nondisclosure claims dismissed under Rule 12(b)(6) where disclosure documents, found adequate, were attached to Complaint). A fishing expedition by respondents through the 7 million pages of documents they have requested (Opp. 10) will not illuminate the relevant question of whether MSU had already disclosed respondents' five factors well before the stock price decline alleged by respondents.[2]

The District Court in this case found that MSU's public disclosures clearly informed any reasonable investor, well before

---

1 The Court of Appeals' discussion of materiality becomes moot when the total absence of the critical element of loss causation is recognized.

2 Respondents' discussion of the absence of discovery rings hollow because, as the Court of Appeals noted, respondents failed to avail themselves of the opportunity afforded by Rule 56(f) of the Federal Rules of Civil Procedure to furnish affidavits in opposition or to request "for reasons stated" an opportunity to conduct discovery necessary to oppose the motion. (17a.)

the stock price decline cited by respondents, of the matters allegedly undisclosed. (48a-50a.) This finding demonstrates the complete absence of an element essential to respondents' securities fraud claim: loss causation. The Court of Appeals' reversal of the District Court's grant of summary judgment thus erroneously rejects the District Court's economical and perceptive implementation of the increasingly employed doctrine of loss causation to expose unmeritorious securities fraud claims.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Dated: October 17, 1988

Respectfully submitted,

HERSCHEL L. ABBOTT, JR.
ROBERT B. BIECK, JR.
DAVID G. RADLAUER
RICHARD J. TYLER
THOMAS A. CASEY, JR.

JONES, WALKER, WAECHTER,
POITEVENT, CARRERE
& DENEGRE
201 St. Charles Avenue
New Orleans, Louisiana 70170
(504) 582-8000

CHARLES F. SCHIRMEISTER
Counsel of Record
LOUIS H. WILLENKEN
PETER C. WILLIAMS

REID & PRIEST
40 West 57th Street
New York, New York 10019
(212) 603-2000

W.D. MERIWETHER, JR.
Of Counsel
MIDDLE SOUTH UTILITIES, INC.
639 Loyola Avenue
New Orleans, Louisiana 70113
(504) 569-4214

Attorneys for Middle South Utilities, Inc.,
Mississippi Power & Light Company,
Louisiana Power & Light Company,
New Orleans Public Service Inc.,
Arkansas Power & Light Company,
System Energy Resources, Inc.
and all individual petitioners

JAMES W.B. BENKARD
LAUREEN F. BEDELL

DAVIS, POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

DANIEL LUND

MONTGOMERY, BARNETT, BROWN, READ, HAMMOND & MINTZ
1800 First NBC Building
New Orleans, Louisiana 70112
(504) 585-3200

Counsel for Morgan Stanley & Co., First Boston Corp. and Merrill Lynch Capital Markets

HENRY G. BISGAIER

CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

HARRY A. ROSENBERG

PHELPS, DUNBAR, MARKS CLAVERIE & SIMS
400 Poydras Street
New Orleans, Louisiana 70130
(504) 566-1311

Counsel for Deloitte, Haskins & Sells